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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 1075

EDNA MAE BOOKER,
Respondent,

vs.

MIRIAM B. PHILLIPS, Superintendent, Kansas State Industrial Reformatory for Women,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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INDEX

Opinions Below 1

Jurisdiction 2

Questions for Review 2

Constitutional and Statutory Provisions Involved 3

Statement of Facts 3

Reasons for Granting the Writ 5

Argument—

I. If the Implied Acquittal Doctrine of *Green* v. *United States* Is Applicable to the States Via *Benton* v. *Maryland*, It Should Be Applied Prospectively Only 6

(a) Implied acquittal in Kansas 7

(b) The nature and function of double jeopardy 8

(c) Retroactivity of *Benton* 11

II. *Green* v. *United States* Is Inapplicable to the Facts of This Case 20

III. The Implied Acquittal Doctrine Should Not Be a Part of the Fifth Amendment Double-Jeopardy Protection, or Applicable to the States Via *Benton* 22

Conclusion 29

Appendix—

Opinion, United States Court of Appeals, Tenth Circuit A1

Memorandum and Order, United States District Court for the District of Kansas A7

Table of Cases

Aguilar v. *Texas*, 378 U.S. 108 (1964) 26

Anders v. *California*, 386 U.S. 738 (1967) 26

Benton v. *Maryland*, 395 U.S. 784 (1969) 2, 5, 6, 7, 12, 13, 15, 18, 19, 20, 24

Booker v. *Kansas*, 391 U.S. 965 (1968) 4, 8, 17, 18

Booker v. *Phillips*, (10th Cir., No. 132-68, November 12, 1969) 5
Brady v. *Maryland*, 373 U.S. 83 (1963) 26
Brock v. *North Carolina*, 344 U.S. 424 (1953) 29
Bryan v. *United States*, 338 U.S. 552 (1950) 27
Cichos v. *Indiana*, 385 U.S. 76 (1966) 18
Coles v. *Peyton*, 389 F.2d 224 (4th Cir. 1968) 26
Cox v. *State*, 197 Kan. 395, 416 P.2d 741 (1966) 8
Desist v. *United States*, 394 U.S. 244 (1969) 12
De Backer v. *Brainard*, ... U.S. ....., 24 L.Ed.2d 148 (1969) 12
De Stefano v. *Woods*, 392 U.S. 631 (1968) 12
Escobedo v. *Illinois*, 378 U.S. 478 (1964) 13, 14
Ex parte Lange, 18 Wall. (85 U.S.) 163 (1878) 8
Foreman v. *United States*, 361 U.S. 416 (1960) 10, 27
Fuller v. *Alaska*, 393 U.S. 80 (1968) 12
Gideon v. *Wainwright*, 372 U.S. 335 (1963) 12, 15, 19, 25
Gori v. *United States*, 367 U.S. 364 (1961) 27
Green v. *United States*, 355 U.S. 184 (1957) 2, 3, 5, 6, 19, 20, 21, 22, 28
Griffin v. *California*, 380 U.S. 609 (1965) 13, 26
Griffin v. *Illinois*, 351 U.S. 12 (1956) 12, 15, 20
Halliday v. *United States*, 395 U.S. 831 (1969) 12, 14
Hetenyi v. *Wilkins*, 348 F.2d 844 (2d Cir. 1965) 17
Howard v. *United States*, 372 F.2d 294 (9th Cir. 1967) 8, 9, 10
In re Christensen, 166 Kan. 671, 203 P.2d 258 (1949) 8
Jackson v. *Denno*, 378 U.S. 368 (1964) 12
Jenkins v. *Delaware*, 395 U.S. 213 (1969) 12
Johnson v. *New Jersey*, 384 U.S. 719 (1966) 12, 13, 14, 15
Keener v. *Tennessee*, 281 F. Supp. 964 (D.C.E.D. Tenn. 1968) 26

BLEED THROUGH POOR COPY

Keerl v. *Montana*, 213 U.S. 135 (1909) 9
Klopfer v. *North Carolina*, 386 U.S. 213 (1967) 26
Linkletter v. *Walker*, 381 U.S. 618 (1965) 12, 13, 14
Mapp v. *Ohio*, 367 U.S. 643 (1961) 12, 13
McCabe v. *Bronx County Court*, 199 N.Y.S.2d 241 (Sup. Ct. 1960) 10
McKane v. *Durston*, 153 U.S. 684 (1894) 29
Miranda v. *Arizona*, 384 U.S. 436 (1966) 13, 14, 26
North Carolina v. *Pearce*, 395 U.S. 711 (1969) 21
Opper v. *United States*, 348 U.S. 84 (1954) 15
Palko v. *Connecticut*, 302 U.S. 319 (1937) 5, 17, 19
Pitts v. *North Carolina*, 395 F.2d 182 (4th Cir. 1968) 26
Roberts v. *Russell*, 392 U.S. 293 (1968) 12, 15, 16
Price v. *Georgia*, (October 1969 Term, Docket No. 269) 5, 6
Spidle v. *State*, 38 L.W. 2302 (Missouri Supreme Court, November 11, 1969) 5, 20
State v. *Booker*, 197 Kan. 13, 415 P.2d 411 (1966)..... 1, 4
State v. *Booker*, 200 Kan. 166, 434 P.2d 801 (1967) *cert. denied* 391 U.S. 965 (1968) 2, 4, 8
State v. *Hart*, 33 Kan. (2d Ed.) 218, 6 Pac. 288 (1885) 8
State v. *Hess*, 178 Kan. 452, 289 P.2d 759 (1955) 8
State v. *Hess*, 180 Kan. 472, 304 P.2d 574 (1956) 8
State v. *McCord*, 8 Kan. (2d Ed.) 232 (1871) 7, 8, 17
State v. *Miller*, 35 Kan. (2d Ed.) 328, 10 Pac. 865 (1886) 8
State v. *Morrison*, 67 Kan. 144, 72 Pac. 554 (1903) 8
State v. *Phillips*, 175 Kan. 50, 259 P.2d 185 (1953) 8
State v. *Rust*, 31 Kan. (2d Ed.) 509, 3 Pac. 428 (1884) 8
State v. *Terreso*, 56 Kan. 126, 42 Pac. 354 (1895) 8
State v. *White*, 71 Kan. 356, 80 Pac. 589 (1905) 8
Stovall v. *Denno*, 388 U.S. 293 (1967) 12, 13, 14
Stroud v. *United States*, 251 U.S. 15 (1919) 22, 27
Tehan v. *Shott*, 382 U.S. 406 (1966) 12, 13, 14

Trono v. *United States*, 199 U.S. 521 (1905) 10, 22
United States v. *Ball*, 163 U.S. 662 (1896) 9, 10, 27
United States v. *Ewell*, 383 U.S. 116 (1966) 10
United States v. *Perez*, 9 Wheat. (22 U.S.) 579 (1824) .. 9, 27
United States v. *Shotwell Manufacturing Co.*, 355 U.S. 233 (1957) 10
United States v. *Tateo*, 377 U.S. 463 (1964) 9, 10, 11, 28
Wolf v. *Colorado*, 338 U.S. 25 (1949) 12

CONSTITUTIONAL PROVISIONS AND STATUTES

Constitution of the United States—
Amendment 5 ..... 3, 5, 18, 21
Amendment 14 ..... 3, 16, 18
Kans. L. 1969, ch. 291, § 8 26
K.S.A. 62-1023 ..... 3, 15
K.S.A. 62-1601 ..... 3, 7, 24
K.S.A. 62-1602 ..... 3, 7, 24
K.S.A. 62-1701 11
Rule 16, F.R.Cr.P. 26
Rule 17, F.R.Cr.P. 26
Terr. L. 1858, ch. 12, art. 13, § 1 7
Terr. L. 1858, ch. 12, art. 13, § 2 7
Terr. L. 1859, ch. 27, § 256 7
Terr. L. 1859, ch. 27, § 257 7

OTHER AUTHORITIES

61 A.L.R.2d 1141, 1156-1165, 1178-1183, 1189-1196 17
A.L.R.2d Later Case Service, pp. 437, 438, 439 17
45 Journal of Urban Law 405, 407-08 (1967) 10, 25
1968 Later Case Service Supplement, pp. 49-50 17
56 Mich. L.Rev. 1192 (1958) 23
6 U.C.L.A. L.Rev. 321 (1959) 23
15 Washington and Lee L.Rev. 276 (1958) 23

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Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in *Booker* v. *Crouse,* No. 132-68 on November 12, 1969.

OPINIONS BELOW

Edna Mae Booker was convicted of first-degree manslaughter in conection with the death of her husband in Wichita, Kansas, on March 8, 1965. She appealed to the Supreme Court of Kansas, and the judgment of conviction was reversed. *State* v. *Booker,* 197 Kan. 13, 415 P.2d 411 (1966). She was again convicted of first-degree man-

slaughter in the Sedgwick County District Court, and again appealed to the Kansas Supreme Court, this time unsuccessfully. *State* v. *Booker*, 200 Kan. 166, 434 P.2d 801 (1967), *cert. denied* 391 U.S. 965 (1968).

Mrs. Booker then filed a petition for habeas corpus in the United States District Court for the District of Kansas. The Honorable Frank G. Theis, District Judge, denied relief on August 13, 1968. That court's opinion is not published, and is set out in the appendix commencing at page A7.

On appeal to the United States Court of Appeals for the Tenth Circuit, the decision was reversed by that court in an opinion filed November 12, 1969. The opinion of the Circuit Court is not published as of this date, and is reprinted in the appendix commencing at page A1.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 12, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

QUESTIONS FOR REVIEW

I. Should the decision of this Court in *Benton* v. *Maryland*, 395 U.S. 784 (1969), operate retroactively to apply the implied acquittal doctrine of *Green* v. *United States*, 355 U.S. 184 (1957), to a Kansas conviction on October 24, 1966?

II. Does *Green* v. *United States* apply to a state conviction where the defendant was convicted of an offense which was not higher than the offense of which she was convicted at her first trial.

III. Is the implied acquittal doctrine of *Green* v. *United States* currently valid for state prosecutions.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment 5, Constitution of the United States:

". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . "

Amendment 14, Constitution of the United States, § 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

K.S.A. 62-1023:

"TRIAL OF INDICTMENT FOR FELONY; INCLUDED OFFENSE. Upon the trial of an indictment for a felony, the defendant may be found guilty of any other felony or misdemeanor necessarily included in that with which he is charged in the indictment or information."

K.S.A. 62-1601:

"NEW TRIAL DEFINED. A new trial is a reexamination of the issue in the same court."

K.S.A. 62-1602:

"EFFECT OF GRANTING NEW TRIAL; FORMER VERDICT NOT USED OR REFERRED TO. The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to either in the evidence or argument."

STATEMENT OF FACTS

Edna Mae Booker is serving a sentence after being convicted of first-degree manslaughter in connection with the death of her husband in Wichita, Kansas, on March 8,

1965. The conviction she is serving occurred in Mrs. Booker's second trial. The first trial also resulted in a conviction of first-degree manslaughter.

Originally, Mrs. Booker was charged with first-degree murder. She was convicted of first-degree manslaughter, and upon appeal the Kansas State Supreme Court reversed the jury verdict. *State* v. *Booker*, 197 Kan. 13, 415 P.2d 411 (1966). She was subsequently tried again on a charge of first-degree murder and again convicted of manslaughter in the first degree. It is the validity of that conviction that is in question. Subsequent to the second conviction, Mrs. Booker again appealed to the Kansas Supreme Court, this time unsuccessfully. *State* v. *Booker*, 200 Kan. 166, 434 P.2d 801 (1967), *cert. denied* 391 U.S. 965 (1968).

The Kansas Supreme Court reversed the original conviction because the jury was improperly instructed concerning the effect of carrying a concealed weapon. That court held the submitted instruction was incomplete and, in its existing form, prejudiced the substantial rights of Mrs. Booker. *State* v. *Booker*, 197 Kan. at 15-17, 415 P.2d at 414.

Mrs. Booker's contention in federal courts—the same contention that was rejected below in the Kansas Supreme Court (*State* v. *Booker*, 200 Kan. at 175, 434 P.2d at 808) and upon which certiorari was denied (*Booker* v. *Kansas*, 391 U.S. 965 [1968])—is that when she was originally tried for first-degree murder and convicted of first-degree manslaughter, she was implicitly acquitted of first-degree murder, and that implied acquittal barred reprosecution in her second trial for first-degree murder. She alleged that this course of action violated the double-jeopardy clause of the Federal Constitution. The district court denied relief without an evidentiary hearing upon the conclusion that only a legal issue was involved and that issue did not entitle petitioner to her release (Appendix, A9).

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Upon appeal, the United States Court of Appeals for the Tenth Circuit reversed, holding that *Benton* v. *Maryland*, 395 U.S. 784 (1969), was to be applied retroactively, thus invalidating Mrs. Booker's conviction on the basis of the implied acquittal doctrine of *Green* v. *United States*, 355 U.S. 184 (1957).

REASONS FOR GRANTING THE WRIT

This case presents a question of first impression concerning interpretation of a federal constitutional right. *Benton* v. *Maryland*, 395 U.S. 784 (1969), overruled *Palko* v. *Connecticut*, 302 U.S. 319 (1937), and made applicable to the states the double jeopardy clause of the Fifth Amendment to the Federal Constitution. Is *Benton* retroactive so as to apply to this 1966 conviction? Are federal double jeopardy standards automatically applied to the states via *Benton*? Does the rule of *Green* v. *United States*, 355 U.S. 184 (1957), apply to a case where the defendant was convicted of the same crime in a retrial as she was in her original trial? Should *Green* remain the controlling authority in retrial of state cases? These questions are all presented in this case. The first three problems concern questions of first impression.

In answering these questions in the affirmative, the Circuit Court of Appeals for the Tenth Circuit noted that this Court would have to ultimately speak upon the questions concerning *Benton's* effect. Appendix, A4. This case presents that opportunity. See also *Price* v. *Georgia*, October 1969 Term, Docket No. 269.

It should also be noted that the only two cases considering *Benton's* effect have reached contrary conclusions. *Compare Booker* v. *Phillips*, 10th Circuit Court of Appeals, No. 132-68, November 12, 1969, with *Spidle* v. *State*, 38 L.W. 2302, Missouri Supreme Court, November 11, 1969.

ARGUMENT

I. If the Implied Acquittal Doctrine of Green v. United States Is Applicable to the States Via Benton v. Maryland, It Should Be Applied Prospectively Only.

One consideration of overriding importance in this case is whether or not *Benton* v. *Maryland*, 395 U.S. 784 (1969), is to be applied retroactively. The significance of this problem has already been noted, as this Court has directed counsel in *Price* v. *Georgia*, Oct. 1969 Term, Docket No. 269, to brief the question of *Benton's* retroactivity. In our case, the Tenth Circuit Court of Appeals applied *Benton* retroactively and, without commenting upon the issue, concluded that the federal standard of implied acquittal first announced in *Green* v. *United States*, 355 U.S. 184 (1957), would operate to invalidate Mrs. Booker's second conviction of first-degree manslaughter. The Circuit Court's determination was based exclusively on the conclusion that the federal double jeopardy standard would invalidate Mrs. Booker's conviction. At the outset, we note that Mrs. Booker was not convicted of a crime of which she was impliedly acquitted, as was the case in *Green*, but was convicted of the same crime in both trials after being charged by information in both trials with the crime of first-degree murder. We shall consider some of the other problems inherent in the Circuit Court's ruling subsequently.

Does *Benton* v. *Maryland*, *supra*, apply the federal implied acquittal doctrine to the states retroactively, if at all? We think it does not. Admittedly, the question of determining retroactive application of any new extension of constitutional criminal doctrine is difficult. We have tried to analyze the recent decisions of this Court which have considered the retroactivity problem and the criteria used for determining a retroactivity answer in this case. With all due respect to the opinion of the Tenth Circuit

Court of Appeals, we feel proper consideration was not given to the bases of this Court's previous decisions concerning retroactivity.

(a) Implied acquittal in Kansas. While considering retroactivity of the implied acquittal doctrine, reference must be had to the established statutory and case law existing in Kansas prior to *Benton*.

The Kansas rule rejecting acquittal by implication is predicated upon construction of statutes which have been a part of the law of Kansas since territorial status. (See Terr. L. 1858, ch. 12, art. 13, § 1; Terr. L. 1859, ch. 27, § 256; Terr. L. 1858, ch. 12, art. 13, § 2; Terr. L. 1859, ch. 27, § 257.) The statutes in question were enacted by the State Legislature in 1868, and in identical form are codified as K.S.A. 62-1601 and K.S.A. 62-1602. They provide, respectively:

> "A new trial is a re-examination of the issue in the same court."
>
> "The granting of a new trial places the parties in the same position as if no trial had been had; the former verdict cannot be used or referred to either in the evidence or argument."

The Kansas Supreme Court first construed these statutes in 1871. *State* v. *McCord*, 8 Kan. (2d Ed.) 232 (1871). In that case it was held that the statutory language, "the issue," which was the entity to be re-examined upon a new trial, was the entire issue that was raised in the first trial, not part of the issue. l.c. 242, 243. The court concluded:

> ". . . The granting of a new trial places the parties in the same position as if no trial had been had." *McCord, supra.*

Upon this basis the implied acquittal doctrine was rejected. A verdict finding a criminal defendant guilty of a lesser

included offense when charged with a higher offense did not impliedly acquit the defendant of the higher offense. The issue to be re-examined in the new trial, if one occurred, was the entire proceeding as it had originally commenced.

Through the years, the Kansas Supreme Court has never wavered from its initial interpretation of the Kansas statutes. *State* v. *Rust*, 31 Kan. (2d Ed.) 509, 3 Pac. 428 (1884); *State* v. *Hart*, 33 Kan. (2d Ed.) 218, 6 Pac. 288 (1885); *State* v. *Miller*, 35 Kan. (2d Ed.) 328, 10 Pac. 865 (1886); *State* v. *Terreso*, 56 Kan. 126, 42 Pac. 354 (1895); *State* v. *Morrison*, 67 Kan. 144, 72 Pac. 554 (1903); *State* v. *White*, 71 Kan. 356, 80 Pac. 589 (1905); *In re Christensen*, 166 Kan. 671, 203 P.2d 258 (1949); *State* v. *Phillips*, 175 Kan. 50, 259 P.2d 185 (1953); *State* v. *Hess*, 178 Kan. 452, 289 P.2d 759 (1955); *State* v. *Hess*, 180 Kan. 472, 304 P.2d 574 (1956); *Cox* v. *State*, 197 Kan. 395, 416 P.2d 741 (1966); *State* v. *Booker*, 200 Kan. 166, 434 P.2d 801 (1967). As late as 1968, this Court refused to consider the validity of the Kansas statutes as interpreted in light of federal constitutional standards. *Booker* v. *Kansas*, 391 U.S. 965 (1968). It is in light of this ninety-eight years' consistent statutory construction precluding application of the implied acquittal doctrine that we consider Benton's retroactivity.

(b) The nature and function of double jeopardy.

Initially, double jeopardy prohibited a second punishment for the same offense and, as well, a second trial for the same offense, whether or not the accused had suffered punishment. *Ex parte Lange*, 18 Wall. (85 U.S.) 163, 169 (1873); *Howard* v. *United States*, 372 F.2d 294, 297 (9th Cir. 1967). The constitutional prohibition against double jeopardy was designed to protect the individual from "being subjected to the hazards of trial and possible

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conviction more than once for an alleged offense." *Green, supra,* at 187. But, the prohibition against second trials as a violation of double jeopardy has for many years had exceptions. *United States* v. *Tateo,* 377 U.S. 463, 465 (1964); *Keerl* v. *Montana,* 213 U.S. 135, 137-38 (1909); *United States* v. *Ball,* 163 U.S. 662, 672 (1896); *United States* v. *Perez,* 9 Wheat. (22 U.S.) 579, 580 (1824).

> "The historically created policies sought to be served by the double jeopardy provisions written into the Constitutions of our various American jurisdictions are well known. For the purpose of this case, the only pertinent consideration is the policy protecting the accused from harassment and from the physical, psychological and financial burden of successive prosecutions.
>
> * * *
>
> "The other protections being: prevention of multiple punishments for a single offense and protection of citizens through the jury system from unpopular laws."
>
> * * *
>
> "But balanced against this most worthy objective is the countervailing social interest in preventing the guilty from escaping just punishment. This latter consideration must not be permitted such emphasis as to deprive an accused of the constitutional safeguards, however, where potential harassment is at a minimum and unfairness to the defendant not persuasive, and where the probability of an improper acquittal is evident, the interest of society in convicting the guilty is entitled to great weight." *Howard, supra,* at 299.

The same Court then notes an obvious fact.

> "All criminal trials must, to some extent, be a burden, financially, physically and psychologically on an accused. Only when such hardships are magnified or

> added to by some impropriety of the prosecution can such burden come within the purview of the constitutional protection." *Howard, supra,* at 300.

Consideration of harassment by successive prosecutions as the key to double jeopardy has been recognized by legal commentators as well. See Double Jeopardy: Vandercomb to Chicos—Two Centuries of Judicial Failure in Search of a Standard, 45 Journal of Urban Law 405, 407-08 (1967). Double jeopardy is not a portion of the accused's *defense,* but an immunity. *McCabe* v. *Bronx County Court,* 199 N.Y.S.2d 241, 246 (Sup. Ct. 1960).

However, reprosecution of an offense resulting in conviction which is subsequently set aside *does not* violate double jeopardy. *United States* v. *Ewell,* 383 U.S. 116, 121 (1966); *United States* v. *Tateo,* 377 U.S. 463, 465 (1964); *Foreman* v. *United States,* 361 U.S. 416, 425 (1960); *Trono* v. *United States,* 199 U.S. 521, 531, 533 (1905); *United States* v. *Ball,* 163 U.S. 662, 672 (1896). Further, upon re-trial the prosecution is not limited solely to re-presenting the evidence presented at the first trial. *United States* v. *Shotwell Manufacturing Co.,* 355 U.S. 233, 243 (1957).

The reason for these rules is well expressed in *United States* v. *Tateo, supra.*

> "Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they are now in protecting against the effects of improprieties at the trial or pre-trial stage if they knew that reversal of a conviction would put the accused irrevocably be-

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> yond the reach of further prosecution. In reality, therefore, the practice of re-trial serves defendants' rights as well as society's interest. The underlying purpose of permitting re-trial is as much furthered by application of the rule to this case as it has been in cases previously decided." *l.c.* 466.

This practice is contrary to the common-law precedent in England. See *Tateo, supra,* at 465. The practical effect of the English rule is diluted, when it is realized that the right of appeal in a criminal case at common law was almost nonexistent. Therefore, as a practical matter, there was little chance of reversing the conviction once had. Thus, there would be no correction for legal error prejudicial to the defendant's substantial rights by appellate review of the original conviction. To mitigate the harshness of a one-shot attempt at criminal justice, most of the states (and in this instance, Kansas) provide a remedy by way of statutory appeal. K.S.A. 62-1701. It is not unreasonable to argue that having given criminal defendants an opportunity to have their convictions reviewed for errors of law, if such an error is found they should be retried on the original charge. The advantage the privilege of appeal supplies to criminal procedure is obvious. As it relates to retrial, the benefits of appeal outweigh the detriment of retrial.

> ". . . Mr. Justice McLean, on circuit, vigorously rejected the view that the constitutional provision prohibited a new trial on the defendant's motion after a conviction, or that it 'guarantees to him the right of being hung, to protect him from the danger of a second trial.' " *Green, supra,* at 213 (Dissenting opinion of Mr. Justice Frankfurter).

(c) Retroactivity of Benton.

Our research indicates at least ten cases decided by this Court between 1965 and 1969 in which criminal con-

stitutional law holdings, requiring reversal of older decisions, were held to operate only prospectively. See *Linkletter* v. *Walker*, 381 U.S. 618 (1965); *Tehan* v. *Shott*, 382 U.S. 406 (1966); *Johnson* v. *New Jersey*, 384 U.S. 719 (1966); *Stovall* v. *Denno*, 388 U.S. 293 (1967); *De Stefano* v. *Woods*, 392 U.S. 631 (1968); *Jenkins* v. *Delaware*, 395 U.S. 213 (1969); *Fuller* v. *Alaska*, 393 U.S. 80 (1968); *Desist* v. *United States*, 394 U.S. 244 (1969); *Halliday* v. *United States*, 395 U.S. 831 (1969); *De Backer* v. *Brainard*, ... U.S. ....., 24 L.Ed.2d 148 (1969).

There have also been four principal cases in which criminal constitutional law holdings reversing earlier Supreme Court decisions have been held to operate retroactively. See *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Jackson* v. *Denno*, 378 U.S. 368 (1964); *Roberts* v. *Russell*, 392 U.S. 293 (1968). Reference to these examples of retroactivity or prospectivity indicates that *Benton* should operate prospectively.

In *Wolf* v. *Colorado*, 338 U.S. 25 (1949), this Court held that the federal exclusionary rule for evidence seized in violation of a criminal defendant's Fourth Amendment right against unreasonable search and seizures need not be applied to the states. Twelve years later, Wolf was reversed. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Whether the *Mapp* doctrine was to be retroactively applied was considered in *Linkletter* v. *Walker*, 381 U.S. 618 (1965). After noting that the retroactive effect of a decision reversing earlier case law

> "depends upon a consideration of 'particular relations . . . and particular conduct . . . of rights claimed to have become vested, of status, of prior determinations deemed to have finality'; and 'of public policy in the light of the nature both of the statute and of its previous application,'" *Linkletter, supra*, at 627.

the Court announced a threefold approach to consideration of the retroactivity problem. Relevant factors were (1) the purposes of the new rule, (2) reliance upon the prior rule, and (3) the effect of retroactivity on the administration of justice. *Linkletter, supra,* at 629, 637, 638. The same approach has been formulated in the other retroactivity cases. See *Tehan* v. *Shott, supra*; *Johnson* v. *New Jersey, supra*; *Stovall* v. *Denno, supra.* Thus, in *Linkletter,* the Court noted that the exclusionary rule announced in *Mapp* was promulgated as a deterrent to unlawful police conduct. The Mapp rule could not affect past police conduct. Therefore, retroactivity, when considered in the light of the purpose of the new rule, would be completely ineffectual. *Linkletter, supra,* at 637.

Likewise, retroactive application of *Benton* in this case would not relieve Mrs. Booker of the hazards of the retrial that has already occurred. As a matter of fact, it would operate to double those detrimental effects to her, if they exist, by requiring yet another trial.

In *Tehan, supra,* the Court concluded that comment by a prosecutor on the failure of the defendant to testify did not relate to protecting the innocent from conviction, but did relate to the social and political values inherent in the constitutional principle against self-incrimination (l.c. 415). The ruptured privacy of the criminal defendant in past cases could not be restored by making *Griffin* v. *California,* 380 U.S. 609 (1965), retroactive.

Likewise, any harassment, physical or psychological burden, that might have been suffered by Mrs. Booker could not be erased by making *Benton* retroactive.

In *Johnson* v. *New Jersey, supra,* the Court determined that the rules for police interrogation announced in *Escobedo* (378 U.S. 478 [1964]) and *Miranda* (384 U.S. 436

[1966]) were not to be applied retroactively (l.c. 729-30). Essential to its holding in *Johnson* was the Court's determination that the purpose of the new standards for police interrogation was, in essence, to upgrade police investigation and to minimize the danger of unknowing waiver of constitutional rights. The Court noted that if *Escobedo* and *Miranda* were to be applied retroactively, a number of criminals convicted on "trustworthy" evidence might be released because the proscribed warnings were not given.

In this case, Mrs. Booker has twice been convicted on the same charge, first degree manslaughter. The convicting evidence was apparently sufficient and trustworthy because the conviction was affirmed on appeal by the state reviewing court.

Also significant in *Johnson* was the fact that other safeguards existed prior to *Miranda* and *Escobedo* to test the voluntariness of any statements made by an accused while being interrogated by the police. The availability of these safeguards protected defendants prior to *Miranda* and *Escobedo* from the adverse effects of custodial police interrogation. Consequently, the new warnings were not held to be required retroactively. See also *Halliday* v. *United States, supra,* at 833. Concerning the validity of Mrs. Booker's conviction, the various state and federal remedies available to test its validity, including possible misconduct of the jury, existed prior to *Benton.*

The common thread running through all the cases denying retroactive effect is a determination that the constitutional rule involved did not affect the "very integrity of the *fact-finding process.*" *Linkletter, supra,* at 639; *Tehan, supra,* at 415-16; *Johnson, supra,* at 727-28; *Stovall, supra,* at 298 (Emphasis supplied). Thus, where retroactive effect has occurred, the rule which has been overruled was of such nature as to (1) deny the indigent a fair trial

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or appeal and thus distort the reliability of the fact-finding process (*Griffin, supra,* at 17, 18-19), (2) destroy the integrity of the fact-finding process by requiring an untrained and unskilled layman to represent himself in court (*Gideon, supra,* at 344-45), (3) deny an accused a fair determination of the voluntariness of a confession prior to the time it is submitted to a jury (*Jackson, supra,* at 383, 386, 389), and (4) admit a confession of a co-defendant implicating the defendant in a joint trial of the two (*Roberts, supra,* at 294-95). In the cases where retroactivity was denied, although the question was a matter of degree, the Court noted that the rule which was being overruled did not really affect the integrity of the *truth-determining process at trial* in connection with the particular substantive rule in question. *Johnson, supra,* at 729.

Double jeopardy does not relate to a determination of truth process in a particular trial.

The only argument made by Mrs. Booker which would in any way relate to the reliability of the fact-finding process is that by allowing the State to re-try her on the greater charge, the jury was allowed to compromise at a higher crime in the list of lesser included crimes. (In Kansas, upon a charge of first degree murder, the jury must be instructed on all lesser included offenses. K.S.A. 62-1023.) This argument assumes that the jury does not fulfill its legal obligation. We do not think that this assumption can be made simply upon an allegation that it existed. Criminal trials in the United States rely upon the ability of the jury to follow instructions. *Opper* v. *United States,* 348 U.S. 84, 95 (1954). *Green's* implied acquittal doctrine is predicated on an assumption that the jury *did follow instructions* and actually considered the higher offense. The jury, in a case such as this, is instructed specifically to follow the evidence and convict upon the basis of their

determination as to the charge of which the criminal defendant is guilty. Although we do not think that this argument, even if true, affects the "fact-finding" process in any criminal trial, we do feel that it must be substantiated by evidence before it provides the basis for a blanket rule that *Benton* is to be applied retroactively to a case such as this.

In its opinion in this case, the Circuit Court noted that the double jeopardy protection was fundamental in the Anglo-American system of jurisprudence. Appendix, A5. Certainly all the constitutional guarantees considered in the cases we've noted are fundamental. Although it sounds ridiculous, there must be degrees of fundamentalness. Whatever the relative weight of the double jeopardy protection, the fact remains that it was not specifically extended to the states by the Fourteenth Amendment and not incorporated into Fourteenth Amendment due process until 1969. Further, even where the right in question is recognized explicitly as fundamental to our application of criminal laws, retroactivity has been denied, *DeStefano, supra,* at 633, 635.

The Circuit Court also commented that the violation of Mrs. Booker's double jeopardy rights, which the Court *assumed* had occurred, " ' "went to the basis of fair hearing and trial because the procedural apparatus never assured . . . a fair determination" of his guilt or innocence.' Roberts v. Russell, 392 U.S. at 294." Appendix, A5. With all due respect, we think the Court's reliance on *Roberts* was misplaced because *Roberts* considered evidence that actually was introduced at trial. Double jeopardy does not, like a confession of a codefendant admitted in a joint trial would, affect the fact determining process.

The second factor to be considered on the retroactivity issue is justifiable reliance by the state prosecutor on

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the earlier rule—in this case, the rule in *Palko* v. *Connecticut*, 302 U.S. 319 (1937). The Kansas rule rejecting implied acquittal is based upon statutes originally enacted one hundred and twelve years ago. Ninety-eight years ago, the Kansas Supreme Court first announced that implied acquittal was not permitted by these statutes. *State* v. *McCord, supra.* This interpretation and statutory proscription have been unsuccessfully attacked before this Court as late as 1968. *Booker* v. *Kansas,* 391 U.S. 965 (1968).

Prior to *Benton,* the states were divided relatively equally concerning the acquittal-by-implication issue. Our research indicates that as of 1969, nineteen states had adopted the doctrine of acquittal by implication, seventeen had rejected it, one had applied it in certain cases and rejected it in others, and one state had conflicting decisions. See Annotation, *Conviction of Lesser Offense as Bar to Prosecution for Greater on New Trial,* 61 A.L.R.2d 1141, 1156-1165, 1178-1183, 1189-1196; A.L.R.2d Later Case Service supplementing Vol. 56-63, pp. 437, 438, 439; 1968 Later Case Service Supplement, pp. 49-50. It is interesting to note, since the publication of the original annotation in 1958, that only two states which originally barred acquittal by implication have reversed themselves. Further, two jurisdictions during the same period of time have initially determined that they will reject acquittal by implication, and two have determined initially to adopt it.

Prior to the time the *Booker* case appeared in Kansas, our research reveals only one circuit court decision holding that acquittal by implication is required to be applied by the states under the Federal Constitution. That case, *Hetenyi* v. *Wilkins,* 348 F.2d 844 (2d Cir. 1965), held that re-trying on the greater offense after conviction on the lesser offense was fundamentally unfair under the due process clause, and did not compel incorporation of the double

jeopardy clause into the Fourteenth Amendment. During the same time period, this Court could have compelled wholesale incorporation of double jeopardy into the Fourteenth Amendment, but refused to do so. See *Booker* v. *Kansas, supra; Cichos* v. *Indiana*, 385 U.S. 76 (1966). While *Cichos* was a 5-to-4 decision, there had been no changes on the Court prior to *Benton*, with the exception that Mr. Justice Fortas, who dissented in *Cichos*, had resigned. We feel justified in concluding, therefore, that prior to *Benton* there was no compelling indication that there would be wholesale incorporation of the Fifth Amendment double jeopardy provision into the due process clause.

The Circuit Court's comments on this factor are quite perplexing to us as representatives of the prosecutorial side of criminal litigation. Concerning the refusal of the Kansas Supreme Court and the Kansas Federal District Court to apply acquittal by implication to Mrs. Booker's case, the Circuit Court noted:

> "Justifiably, those two distinguished courts relied upon the law as enunciated by Palco (sic) v. Connecticut, 302 U.S. 319, and the line of cases following, but which cases are now overruled by the Benton case." Appendix, A3.

But, when it came to the distinguished prosecutor trying this case:

> "The element of reliance is not persuasive because the case overruled by Benton, Palko v. Connecticut, 302 U.S. 319 (1937), has been under serious attack and has been rejected by several courts." Appendix, A5-A6.

Does this mean that the prosecutor cannot rely upon, or in the alternative can ignore, rules promulgated by the highest appellate court to which he is directly responsible and enacted by the legislative body to which he is responsible? Must a prosecutor refuse to apply a statute applicable

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to his cases because several courts have declared the procedure invalid? The fact that several courts have adopted a position implies that many more have not. The situation in this case is quite different from that in *Gideon* v. *Wainwright, supra,* at 345, where the great majority of the states had required counsel in felony cases unless intelligently waived. As indicated previously, the states are pretty equally divided on the implied acquittal issue. Recent state decisions are fairly balanced in result.

The fact remains that *Palko* was good precedent until 1969. Before applying implied acquittal in this case the prosecutor would have had to conclude in 1967 that *Palko* would be overruled, that the federal standard of double jeopardy would be applied to the states in all its minute particulars, that double jeopardy would apply to a case where the defendant was not convicted of the greater offense (contrary to the facts in *Green*), and that either the state statute he was applying would be declared unconstitutional or its application be called an unconstitutional application. Considering the total posture of this case, the prosecutor could justifiably rely on state law.

Concerning the third, and last factor considered in retroactivity cases, we cannot supply very much detailed information. We quite frankly do not know how the retroactive effect of *Benton* will affect the administration of justice. We do know, as indicated previously, that approximately one-half of the states which have ruled on the question have held that there is under state law no acquittal by implication. In that sense, the situation is different from that in *Gideon,* where the great majority of the states had already enacted the rule required by *Gideon. Gideon* v. *Wainwright, supra,* at 345. We do not know, however, how many cases fit into the category applicable to this case where there has been a reversal by an appel-

late court in a state and subsequent retrial on the greater offense.

But,

> "Statistics show that a substantial proportion of criminal convictions are reversed by state appellate courts." *Griffin, supra,* at 18-19.

We also know that implied acquittal has been rejected in Kansas for ninety-eight years. We would therefore expect the retroactive effect of *Benton* to be significant.

Considering the type of protection double jeopardy is supposed to provide, with the criteria previously announced for determining retroactivity. We respectfully submit that the *Green* implied acquittal doctrine should be applied to the states by *Benton*, if at all, prospectively. The same conclusions were reached by the Missouri Supreme Court in *Spidle* v. *State*, 38 L.W. 2302, opinion filed November 10, 1969.

Mrs. Booker's present conviction is valid.

II. Green v. United States Is Inapplicable to the Facts of This Case.

Assuming that the merits of the *Green* double-jeopardy rationale concerning acquittal by implication should be reached in this case, we believe that on the facts *Green* is inapplicable. In *Green*, the defendant had been charged with first-degree murder and convicted by a jury of second-degree murder. After successful appeal, he was re-tried and convicted of first-degree murder. Green was convicted of a charge of which this Court said he had already been acquitted, and consequently the conviction itself was invalid. Mrs. Booker, on the other hand, was not convicted of the charge of which she had been acquitted even if the

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implied acquittal doctrine is utilized. She was originally convicted of first-degree manslaughter, and upon retrial convicted of first-degree manslaughter.

Considering the bases of double jeopardy as preventing (1) retrial or (2) double punishment, the rationale behind the doctrine would be inapplicable to a case where there was no successive or second punishment for the same offense, and there would have been a retrial in any event. A retrial itself does not violate the fifth amendment double-jeopardy provision. See *North Carolina* v. *Pearce*, 395 U.S. 711, 720-21 (1969), and the cases cited previously in this petition at page 10, *supra*. Mrs. Booker would have suffered the hazards of retrial regardless of whether she was charged with first-degree murder or first-degree manslaughter. There has been no intimation in this case that Mrs. Booker could not have been validly charged with and convicted of first-degree manslaughter. The only constitutional indictment of the actual conviction itself is the allegation that her double-jeopardy rights were violated. Thus, with the exception of the fact that she was charged with first-degree murder, there is nothing whatsoever in the record or in argument by counsel for respondent that would in any way impugn what is an otherwise valid conviction.

The only argument that has been made to date concerning this alleged error is that by charging the greater offense, the State allowed the jury to bargain on a higher plane and reach the offense of first-degree manslaughter. In the first place, the State charged Mrs. Booker under valid state laws in 1966 when Mrs. Booker was re-tried under then-existing federal and state law. Secondly, this allegation assumes that the jury did not follow their instructions. If one accepts the validity of the *Green* rationale, we think that conclusion must be predicated upon

an assumption that the Green jury did follow the court's instructions. To assume that a jury would impliedly acquit a defendant of a higher charge assumes that the jury actually considered the higher charge and actually reached a verdict which was not expressed because it was directed to do so by the instructions given by the trial judge. If an assumption of proper jury functioning applies to reach the *Green* rationale, it should likewise apply in this case to require the conclusion that the conviction had was properly reached by the jury and that the jury properly followed the instructions given by the judge, and convicted of first-degree manslaughter without bargaining.

The sole reason given for erasing an otherwise admittedly valid conviction is the speculative allegation of jury bargaining. There is in the record no indication that any such bargaining as a matter of fact occurred. We do not believe that a valid conviction upon a charge of which Mrs. Booker had not been acquitted should be set aside upon such a speculative approach, especially when a contrary approach was necessary for reaching a conclusion that she had been impliedly acquitted of the charge of first-degree murder in her first trial.

III. The Implied Acquittal Doctrine Should Not Be a Part of the Fifth Amendment Double-Jeopardy Protection, or Applicable to the States Via Benton.

Green was decided in 1957. It was the first occasion of which we are aware in which the federal double-jeopardy clause was interpreted by this Court to apply double jeopardy to a factual situation similar to *Green* involving retrial. The case closely resembles earlier decisions of this Court which had reached contrary results. See *Trono* v. *United States*, 199 U.S. 521 (1905); *Stroud* v. *United States*, 251 U.S. 15 (1919). Subsequent to its pronouncement, there was criticism of the *Green* decision in legal periodicals. See, *e.g.*,

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Criminal Law: Double Jeopardy: Limited Waiver, 6 U.C.L.A. L.Rev. 321 (1959); *Constitutional Law—Former Jeopardy—Retrial for Greater Offense After Conviction of Lesser Included Offense Reversed on Appeal,* 56 Mich. L. Rev. 1192 (1958); *A Double-Jeopardy Dilemma in the Federal Courts,* 15 Washington and Lee L.Rev. 276 (1958). While we are sure that others have made the same request, we think it significant enough to request that this Court reexamine the double-jeopardy approach utilized in *Green* in light of current standards of administration of criminal justice. We are quite concerned about the *Green* problem as it currently affects the appellate process and the interest of society in validly convicting an accused defendant of the charge supported by the evidence regardless of whether it is a higher or a lesser included offense.

Several considerations are relevant to this discussion. First, we think all would agree that the criminal law as it currently exists is extremely complicated in all of its various facets, much more so than it was even twelve years ago. The development of prosecutorial and defense technique, the availability of additional forms of testimony or evidence (such as expert witness), an ever-widening range of crimes, and certainly last but not least the ever-increasing availability of new constitutionally required procedures and standards are all coalescing to make the trial of any one criminal case an extremely complex and complicated occurrence. Most of these changes are for the good. They attempt to further the one ultimate goal of the administration of criminal law, and that is to seek the truth. Obviously, when the complexity of the criminal proceeding increases tremendously, the chances of error in any form, whether generated by prosecution, defendant or defense counsel, also increase tremendously. To allow the criminal defendant an opportunity to correct any of these errors which might

be prejudicial to him and at the same time retain *any* verdict advantage from the original suit actually may distort the search for truth. To prohibit a complete reexamination of all the issues involved and the criminal information as originally filed (as would be the case in Kansas under K.S.A. 62-1601 and 1602 prior to *Benton*) is to distort the truth seeking process.

This prejudicial effect upon the individual citizens comprising society may be rendered even though it is not their representative, the prosecutor, who causes the error. A criminal trial is theoretically an adversary proceeding conducted by three distinct and separate entities. The interest of the state is represented by the prosecutor, and his direct adversary is the counsel for defendant. While these two officers of the court present their client's respective cases, the judge, who is a member of the independent judiciary, announces the rules of the game, so to speak. The court is theoretically independent in that it does not foster either the side of the state, or side of the defense. The court is arbitrator in disputes between the two adverse parties where court action is necessary, and as in Mrs. Booker's case, specifically determines the law upon which the case will be submitted to the jury. Suppose the court, as is humanly possible, makes an error in favor of the state. Suppose the state didn't propound the error. While all will readily accept the fact that the defendant may have an opportunity to correct any error prejudicial to him, for some reason we turn around and prejudicially affect the interests of the state in securing a conviction of the charge warranted by the evidence. That result is caused by refusing to let the state commence its prosecution anew, even in situations where there will in any event be a retrial or subsequent prosecution upon more limited issues, such as a lesser crime.

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If, as Mrs. Booker asserts, she was prejudicially affected by a jury compromise, and it is therefore assumed that jury compromises occur, the compromise that occurred may as well have been in her favor and against the state's interest. If that is the case, and it is assumed that a jury compromise is unfair, it would be unfair to the state as well as to the defendant to limit a second trial.

As the propensity for error increases, the extent of the damage to society increases. We submit that the complexity of criminal litigation with its correspondingly greater propensity for error warrants re-examination of the *Green* limitation on starting a criminal proceeding completely anew.

We then come to the second, and probably more significant factor affecting double jeopardy and acquittal by implication. The purpose of double jeopardy is to prevent oppressive harassment by a government against an individual by the use of successive prosecutions. See *Howard* v. *United States, supra,* at 299; Double Jeopardy: Vandercomb to Chicos—Two Centuries of Judicial Failure in Search of a Standard, 45 Journal of Urban Law 405, 407-08 (1967). This rule prevents obtaining a verdict of guilty simply by prosecuting the accused until he gives up. That practice does distort the truth finding process. However, the present position of a criminal accused vis-a-vis the prosecution is much different than was his counterpart's position centuries ago when the double jeopardy protection originated. Today, the accused is so insulated by both constitutional and statutory safeguards from the oppressive effect of retrial that simple resort to the common law conclusion is impractical. Today, the criminal defendant *will* have an attorney representing him if he so chooses. *Gideon* v. *Wainwright,* 372 U.S. 335, 345 (1963). The attorney, if appointed by the state, *will* represent his client

competently or else the conviction is invalid. *E.g., Coles* v. *Peyton,* 389 F.2d 224. 227 (4th Cir. 1968). See also, *Anders* v. *California,* 386 U.S. 738, 741-45 (1967). The defendant *will* have been advised of many of his constitutional rights or else any evidence obtained in violation thereof will be inadmissible. *Miranda* v. *Arizona,* 384 U.S. 436, 468, 469, 472, 473 (1966). The accused will be convicted upon evidence, if seized from him, obtained by valid search or search warrant. See *e.g., Aguilar* v. *Texas,* 378 U.S. 108 (1964). The accused's case will be speedily processed or else the charge dismissed, and possibly ultimate conviction set aside. See *e.g., Klopfer* v. *North Carolina,* 386 U.S. 213, 225 (1967); *Pitts* v. *North Carolina,* 395 F.2d 182, 189 (4th Cir. 1968). The accused will be able to present all the witnesses he desires as long as they are available or else his conviction will not be valid. See *e.g., Keener* v. *Tennessee,* 281 F. Supp. 964, 969-70 (D.C.E.D. Tenn. 1968). See also F.R.Cr.P., Rule 17. The accused may be supplied expert and other investigatory assistance even if he personally cannot pay for such services. See Kans. L. 1969, Ch. 291, § 8. The defendant will, in many instances, be able to discover the nature and sources of the evidence to be used against him at his criminal trial. See F.R.Cr.P., Rule 16. The defendant *will* be able to prevent the prosecution from suppressing evidence favorable to him or his conviction will be set aside. See *e.g.. Brady* v. *Maryland,* 373 U.S. 83 (1963). The defendant will be presumed innocent until proven guilty. The defendant will have a right not to testify, or have that fact commented upon. See *Griffin* v. *California,* 380 U.S. 609 (1965). These are just a few of the procedural and substantive rules which effectively insulate the accused from the oppressiveness or power of the state. The constitution, and its interpretation by this and other courts, and various protections in form of statutes emanating from both the federal and the state

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congresses have effectively evened or balanced the scale so that the defendant and the state will have the same chance to succeed in the criminal prosecution. Even then, the burden of proof beyond reasonable doubt is upon the state, and the defendant is presumed innocent. However, although the relative position of the two adversaries, accused and state, has been significantly altered from that which existed at common law, and even that which existed twelve years ago, the defendant is currently given any benefit of the doubt in double jeopardy cases such as *Green*, even though the subject under consideration *does not relate* to the *correctness of the truth determining process itself*. If any error occurs the defendant is allowed to correct that error, the state is not, and, if he happens to be convicted of a lesser included offense, the state is prejudiced against trying him anew. starting out the same as it had prior to the first trial. When the individual rights of those citizens collectively called society become more significant than those of the individual who is the criminal accused with regard to policy determinations in criminal law certainly is not precise, and we don't pretend to be able to present a dividing line in each and every instance. It would seem, however, that in all fairness to both sides, if the common law double jeopardy rule is not going to be applied absolutely—as it does not in many instances, such as retrial after successful appeal, *Ball* v. *United States*, 163 U.S. 662, 672 (1896); after conviction reversed because of confession of error, *Stroud* v. *United States*, supra; after conviction reversed because of insufficient evidence, *Bryan* v. *United States*, 338 U.S. 552, 560 (1950); after conviction reversed for error in instructions to the jury, *Forman* v. *United States*, 361 U.S. 416, 425 (1960); or after the defendant is placed in jeopardy but the actual trial is not completed for a variety of reasons, see *e.g.*, *Gori* v. *United States*, 367 U.S. 364 (1961); *United States* v. *Perez*, *supra*—it should be

altered to allow one criminal prosecution pursued to an ultimate conclusion free of trial error. To allow the defendant the benefits of an advantage received by him in the form of a verdict on the lessser included offense is just as unfair to the State, which is interested in securing an error-free conviction of a crime supported by the evidence adduced, as it is for the State to suppress evidence, or deny process to an accused, or try him without the assistance of counsel, or any of the other rights to which the defendant is entitled. We think, therefore, that the position the double-jeopardy protection plays in the present administration of criminal justice should be reexamined in light of the present relative position of the defendant vis-a-vis the prosecutor.

A third significant factor affecting conclusions concerning double jeopardy relates to the appeal procedure. At common law, double jeopardy allowed one trial, and that was all. The one-shot approach to truth was rejected in this country by allowing the convicted accused an appeal, something that in normal cases he did not have at common law. See *Tateo, supra,* at 465. It is well recognized that in allowing such an appeal, the traditional double-jeopardy approach is inapplicable when the defendant has secured a reversal of his conviction and the State attempts to try him again. Technically, he will still be harassed and suffer the oppressiveness of the State in bringing him to trial the second time for the crime upon which he was originally charged. We accept that burden as justified in light of the opportunity the defendant has to correct any error prejudicial to him. We, in effect, allow the defendant an opportunity to do better the second time. Or, to paraphrase language quoted earlier, the constitutional doctrine of double jeopardy does not guarantee a defendant the right of dying in order to protect him from the psychological burden of a second trial. See *Green, supra,* at 213

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(dissenting opinion of Mr. Justice Frankfurter). If a defendant can do better a second time, why shouldn't the prosecutor be allowed the same opportunity as long as, procedurally, the objective of truthseeking is protected? This is not the same situation that would confront the Court if the State had prevented a trial from proceeding to a termination "in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time." *Brock* v. *North Carolina,* 344 U.S. 424, 429 (1953). The appeal privilege, which is not required by any constitutional doctrine [*McKane* v. *Durston,* 153 U.S. 684 (1894)], is abused if it operates to attach "vested" interests in what occurred at the first trial. The purpose of the appeal is to determine if the conviction is valid. If it is not valid, then a new trial should be had, or, in certain cases, the defendant discharged. If a new trial is to be had, it should be had under the same rules it was had originally, with the corrections necessary to allow a fair determination of the truth. Any other approach to the appeal process attaches consequences to its use that were not envisioned and, really, concerning today's criminal accused, are not justified.

CONCLUSION

We submit that this case presents an extremely important first-impression question of federal constitutional law, the retroactivity of *Benton* v. *Maryland.* The case also presents significant questions concerning the relationship of the federal double jeopardy clause to state appellate procedure. These questions should be considered by this court. We request that certiorari issue to the United

States Court of Appeals for the Tenth Circuit so that consideration may be had.

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United States Court of Appeals

TENTH CIRCUIT

SEPTEMBER, 1969, TERM

EDNA MAE BOOKER,
Appellant,

vs.

MIRIAM B. PHILLIPS, Superintendent, Kansas State Industrial Reformatory for Women,
Appellee.

Number 132-68

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

(DISTRICT COURT No. L-554)

(Filed November 12, 1969)

Russell Shultz, Wichita, Kansas, for Appellant.

Edward G. Collister, Jr., Assistant Attorney General, Topeka, Kansas, (Kent Frizzell, Attorney General, Topeka, Kansas, on the brief) for Appellee.

Before BREITENSTEIN, HILL and HOLLOWAY, United States Circuit Judges.

HILL, Circuit Judge.

Edna Mae Booker filed this petition for habeas corpus seeking release from the Kansas State Industrial Farm for Women. The district court, without conducting an evidentiary hearing, denied the writ and dismissed the petition. We are thus faced with the question of whether the court erred in determining that appellant's present conviction was not obtained in violation of that portion of the Fifth Amendment that protects an indi-

vidual against being twice placed in jeopardy for the same criminal offense.

In March, 1965, the appellant was charged in the district court of Sedgwick County, Kansas, with the first degree murder of her husband. She entered a plea of not guilty and both sides presented evidence to the jury. The jury was then instructed that the charge of first degree murder encompassed the lesser included offenses of second degree murder and first, third and fourth degree manslaughter.[1] After deliberation, the jury found appellant guilty of first degree manslaughter. On appeal it was determined that an instruction relating to the carrying of a concealed weapon was erroneous and the conviction was reversed, State v. Booker, 415 P.2d 411 (1966).

On remand the appellant was again charged with first degree murder. However, before the second trial began, the defense of double jeopardy was raised based on the contention that appellant could not be reprosecuted for any degree of homicide greater than first degree manslaughter. The objection was overruled, appellant was once more tried for first degree murder, and was again convicted of first degree manslaughter. In a second appeal to the Kansas Supreme Court, the double jeopardy defense was rejected and the sentence which appellant is

1. The jury was instructed as follows:

"The information in this case charges the defendant with murder in the first degree. This charge includes not only murder in the first degree but murder in the second degree, manslaughter in the first degree, manslaughter in the third degree and manslaughter in the fourth degree.

"You should therefore, first determine whether, under the evidence and instructions of the court, the defendant is guilty of murder in the first degree. If the defendant is not . . . you should proceed to determine whether she is guilty of murder in the second degree. * * * [If the defendant is not guilty of second degree murder] you should then consider whether or not she has been proved to be guilty of manslaughter in the first degree. . . ."

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presently serving was approved. State v. Booker, 434 P.2d 801 (Kan. 1967).

Subsequent to this decision of the Kansas Supreme Court and the decision of the district court in this case, the Supreme Court held in Benton v. Maryland, ... U.S. ..... (1969) that the Fifth Amendment guarantee against double jeopardy applies to the states through the Fourteenth Amendment. Justifiably, those two distinguished courts relied upon the law as enunciated by Palco v. Connecticut, 302 U.S. 319, and the line of cases following, but which cases are now overruled by the Benton case. Accordingly, it is now clear that the validity of appellant's conviction must be judged under the federal double jeopardy standards enunciated *inter alia*, in Green v. United States, 355 U.S. 184 (1957).[2] That case invalidated a conviction for first degree murder obtained in a retrial after a previous conviction for second degree murder had been reversed on appeal. The Court observed: "[T]his second trial for first degree murder placed Green in jeopardy twice for the same offense in violation of the Constitution. Green was in direct peril of being convicted and punished for first degree murder at his first trial. He was forced to run the gantlet once on that charge and the jury refused to convict him. * * * Therefore . . . Green's jeopardy for first degree murder came to an end when the jury was discharged so that he could not be retried for that offense." 355 U.S. at 190-191.

Similarly, in the case at bar, appellant was forced to run the gantlet for first and second degree murder at the first trial and could not thereafter be required to run the gantlet again. Consequently, the second trial for first

2. As the Court indicated in Benton: "The validity of petitioner's larceny conviction must be judged . . . under this Court's interpretations of the Fifth Amendment double jeopardy provision." ..... U.S. at .....

degree murder after a previous conviction for manslaughter had been reversed, was in direct violation of the Fifth Amendment and cannot stand.

The fact that unlike the situation in Green v. United States, the appellant here has not been convicted of a greater offense at the second trial is of no consequence. In United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965) the then Circuit Judge Marshall squarely faced this issue and concluded that a defendant convicted of second degree murder, retried for first degree murder, and again convicted of second degree murder, had been twice placed in jeopardy. The reasoning underlying that conclusion is aptly stated in that opinion and need not be repeated here, except perhaps to note that it is not the conviction of the greater offense but the reprosecution for that offense that is repugnant to the Constitution. Stated conversely, it is not important that the defendant may have successfully run the gantlet for a second time; what is critical is that he should not have been required to run again at all. "[T]he State was constitutionally forbidden to prosecute him for first degree murder following the completion of the first trial." 348 F.2d at 864.

There remains for consideration the question of whether the holding in Benton should be denied retroactive effect. "We . . . must resolve the problem with full recognition that only the Supreme Court can give the final answer." Gaitan v. United States, 317 F.2d 494, 497 (10th Cir. 1963).[3]

Since Linkletter v. Walker, 381 U.S. 618 (1965), the Supreme Court has reviewed the retroactivity of decisions expounding new constitutional rules affecting crimi-

3. In a clearly analogous situation an interpretation of double jeopardy has been held to apply retrospectively. Application of McNeer, 343 P.2d 304 (Cal. Dist. Ct. App. 1959). But *cf.* United States v. Yeager, 385 F.2d 478 (3d Cir. 1967).

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nal trials as a function of three criteria: (1) the purpose to be served by the new standards, (2) the extent of the reliance by law enforcement authorities on the old standards, and (3) the effect on the administration of justice of a retroactive application of the new standards.[4] "Foremost among these factors is the purpose to be served by the new constitutional rule." Desist v. United States, 394 U.S. at .....

The purpose of the rule announced in Benton, "one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense, and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."[5] It is precisely this effect that " 'went to the basis of fair hearing and trial because the procedural apparatus never assured . . . a fair determination' of his guilt or innocence." Roberts v. Russell, 392 U.S. at 294.

The extent of reliance by law enforcement officials and the effect on the administration of justice—the second and third factors to be considered—also suggest that Benton should be given retroactive effect.[6] The element of reliance is not persuasive because the case overruled

4. Desist v. United States, 394 U.S. 244 (1969); DeStefano v. Woods, 392 U.S. 631 (1968); Roberts v. Russell, 392 U.S. 293 (1968); Witherspoon v. Illinois, 391 U.S. 510 (1968); Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. Shott, 382 U.S. 406 (1966); See generally, Annot., 10 A.L.R. 3d 1371 (1966) and Annot., 14 L. ed. 2d 992 (1966).

5. Benton v. Maryland, ... U.S. at ....., quoting Green v. United States, 355 U.S. at 187-188.

6. *Cf.* Roberts v. Russell, 392 U.S. at 295.

by Benton, Palko v. Connecticut, 302 U.S. 319 (1937), has been under serious attack and has been rejected by several courts.[7]

In sum, we conclude that Benton is to be given retroactive effect so as to require the application of federal double jeopardy standards to previous state criminal convictions. It follows then as stated above, that appellant's reprosecution for first and second degree murder was constitutionally invalid.

The order denying the petition for habeas corpus is REVERSED with instructions that the writ be granted unless, within a reasonable time, Kansas affords appellant a new trial that conforms to the principles set forth herein.

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7. United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844 (2d Cir. 1965) cert. den. 383 U.S. 913; Patton v. No. Carolina, 381 F.2d 636 (4th Cir. 1967); Shear v. Boles, 263 F. Supp. 855, 859 (N.D.W.Va. 1967).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

EDNA MAE BOOKER,
Petitioner,
vs.
KANSAS STATE INDUSTRIAL FARM FOR WOMEN,
Respondent.
} Civil No. L-554

Memorandum and Order

(Filed August 13, 1968)

There has been filed with the Clerk of this Court a petition for a writ of habeas corpus, signed and verified by the petitioner, Edna Mae Booker. The Court, after examining the pleading so filed, makes the following findings and orders.

The petitioner inadvertently omitted the name of the respondent in her petition, and this Court, under the provisions of 18 U.S.C.A. §2242 requiring the same, inserts the Kansas State Industrial Reformatory for Women as the respondent herein, and the caption shall henceforth read Edna Mae Booker v. Kansas State Industrial Reformatory for Women.

It appears from the petition that Edna Mae Booker is currently in the custody of the respondent, the Kansas State Industrial Reformatory for Women, under or by color of authority of the State of Kansas, and is serving a sentence of not less than five nor more than twenty-one years, imposed by the District Court of Sedgwick County, Kansas, following a finding of guilty by jury on the charge of first degree manslaughter, as defined in K.S.A. 21-407. This conviction was appealed and was very recently af-

firmed by the Kansas Supreme Court in *State* v. *Booker,* 200 Kan. 166 (1967). The Court has before it the opinion of Justice Kaul as rendered in *State* v. *Booker,* supra, and it appears that the same contentions and grounds stated in the petition now before this Court were made the basis of the appeal to the Kansas Supreme Court.

The petitioner contends in substance (see paragraphs 10 and 11 of petition) that she is being held in custody unlawfully for the reason that she has been required to stand trial twice for the same crime, even though a jury found her not guilty of the crime charged in her first trial. The grounds stated in the petition are at first unclear until the opinions of the Kansas Supreme Court in *State* v. *Booker,* 197 Kan. 13 (1966), and *State* v. *Booker,* 200 Kan. 166 (1967) are referred to for edification.

Edna Mae Booker was charged and tried by the District Court of Sedgwick County, Kansas, and found guilty of manslaughter in the first degree, as defined in K.S.A. 21-407. The verdict and judgment of the first trial was appealed and was reported in *State* v. *Booker,* 197 Kan. 13 (1966), where the Supreme Court of Kansas reversed the trial court with directions to grant a new trial. A new trial was had and Edna Mae Booker was, for the second time, charged with murder in the first degree, and for the second time was found guilty of manslaughter in the first degree, as defined in K.S.A. 21-407. The verdict and judgment of the second trial was appealed and this time affirmed by the Kansas Supreme Court in *State* v. *Booker,* 200 Kan. 166 (1967), certiorari denied by the United States Supreme Court on June 3, 1968.

The Supreme Court of Kansas, in the case reported in 200 Kan. 166, at page 175, passed on the issue of double jeopardy now raised in this Court, and stated:

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> "Finally, defendant claims error in being required to stand trial on a charge of murder in the first degree after having been previously convicted of manslaughter in the first degree in a previous trial when she was tried for first degree murder. This question is settled by our opinion in the recent case of *Cox* v. *State,* 197 Kan. 395, 416 P.2d 741, wherein we re-examined the position of this court with regard to the statutory framework within which a new trial is granted in this state. Further comment is unnecessary."

This Court has considered the opinions of the Kansas Supreme Court in light of the recent holding of the Court of Appeals for the Tenth Circuit in *Wood* v. *Crouse,* 389 F.2d 747 (1968), and it appears conclusively to this Court that the questions here raised are legal and not factual, and that there is no difference in the facts here and those considered by the Kansas Supreme Court, and that the facts considered by the Kansas Supreme Court were sufficient and a full and fair consideration was made by that Court reaching the merits of the petitioner's allegations. In a well-reasoned opinion, Justice Kaul examined in full the contentions made by Edna Mae Booker in her appeals. This Court concurs completely with Justice Kaul's opinion, as rendered in 200 Kan. 166.

It should be pointed out that on the issue of double jeopardy, the Kansas Supreme Court relies on the case of *Cox* v. *State,* 197 Kan. 395, where it is stated that the "doctrine of acquittal by implication has not been accepted in this state." That is to say, where a person stands trial for one charge and is found guilty of a lesser included offense, and the verdict and judgment is then reversed, the original charge may be brought for the second time without violating the rule of double jeopardy. Support for this reasoning is that a reversal and remand by the Ap-

pellate Court leaves the trial court free to proceed as if there had been no former trial. This is illustrated in *United States* v. *Watson*, 146 F. Supp. 258 (see Syl. 1); and 154 Fed. Rep. 836. Further authority for this Court's acceptance of the opinion of the Kansas Supreme Court is found in *Cichos* v. *State of Indiana*, 87 S.Ct. 271 (1966). Under the provisions of 28 U.S.C.A. §2254, as amended November 2, 1966, this Court will accept the findings of the Kansas Supreme Court.

This Court further finds that the petitioner is in the lawful custody of the Kansas State Industrial Reformatory for Women, that she is not illegally restrained of her liberty, and is not entitled to the relief sought in her petition.

IT IS THEREFORE ORDERED that the action so filed be, and it is hereby, dismissed without prejudice, and the Clerk shall enter judgment accordingly.

IT IS FURTHER ORDERED that copies of this Memorandum and Order be transmitted by the Clerk to the parties named herein; and in addition, that copies be mailed to the Honorable B. Mack Bryant, Judge of the District Court of Sedgwick County, Kansas, to Keith Sanborn, County Attorney of Sedgwick County, Kansas, to Russell Shultz, Attorney at Law, 331 S. Hydraulic, Wichita, Kansas, and to the office of the Attorney General of Kansas, at Topeka, Kansas.

Dated at Wichita, Kansas, this 9th day of August, 1968.

/s/ Frank G. Theis
United States District Judge